IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3492 of 2002
WITH
SPECIAL CIVIL APPLICATION No 3518 of 2002
WITH
SPECIAL CIVIL APPLICATION No 3519 of 2002
WITH
SPECIAL CIVIL APPLICATION No 3520 of 2002
WITH
SPECIAL CIVIL APPLICATION No 3554 of 2002
WITH
SPECIAL CIVIL APPLICATION No 8266 of 2001
WITH
SPECIAL CIVIL APPLICATION No 8281 of 2001
WITH
SPECIAL CIVIL APPLICATION No 8288 of 2001
WITH
SPECIAL CIVIL APPLICATION No 8291 of 2001
WITH
SPECIAL CIVIL APPLICATION No 8292 of 2001

For Approval and Signature:
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHRIRAM OIL CORPORATION
Versus
STATE OF GUJARAT

Appearance:
MR JS YADAV, MS.KAVITA J.YADAV, MR RC JANI AND
MR RM CHHAYA for Petitioner.
MR AD OZA, GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 10/07/2002

CAV. JUDGEMENT

1. Mr.Yadav seeks permission to amend petitions in Special Civil Application Nos. 3518, 3519,3520 of 2002 as per draft amendment. Permission granted.

2 Rule.
Mr.A.D.Oza, learned Government Pleader appears and waives service of Rule.

3 In this group of petitions the issue involved being common, by consent of the respective Advocates appearing on behalf of different petitioners and the learned Government Pleader they have been heard together and are disposed off by this common judgment and order.

4 The petitioners in this batch of petitions have been doing the business of selling Kerosene as wholesale dealers after obtaining licence under the Gujarat Essential Articles (Licence, Control and Stock Declaration) Order,1981 (hereinafter referred to as 'Order, 1981'). It appears that on 31/12/2001 the Government of Gujarat published an Order by Notification in the Government Gazette. The said order reads as under:

"FOOD CIVIL SUPPLIES & CONSUMER AFFAIRS DEPARTMENT

Order

Sachivalaya, Gandhinagar, 31st December,2001.

NO.GTH/2001/30/KSN/1294/3515/PART/B.

In view of the judgment delivered by the Division Bench of Hon.Gujarat High Court in various LPA's filed by Group of wholesale kerosene dealers (other than Company Agents), the following orders are issued.

In exercise of the powers conferred by Section 28 of the Gujarat Essential Articles (Licensing, Control and Stock Declaration) Order 1981, the Government hereby makes the following order.

(1) This Order may be called the Gujarat Essential Articles (Licensing, Control and Stock Declaration) Amendment Order,2001.

(2) It shall come into force at once and shall apply to those P.D.S.kerosene wholesale dealers, who are not Company Agents.

(3) The existing licences of the PDS kerosene, which expire on 31st December,2001 of wholesale kerosene dealers, who are not Company agents, shall be renewed for the further period of three months i.e. upto 31st March,2002.

By order and in the name of the
Governor of Gujarat.

AKHATAR SAIYED
Section Officer."

4.1 The period of three months mentioned in the aforesaid order has further been extended by another Order by way of Notification dated 30/3/2002 extending the period of renewal upto 30/6/2002. It is the original Notification and the subsequent Notification extending the period which are under challenge in this group of petitions.

5 The say of the petitioner is that clause 5 of the Order,1981 which provides for validity of licences for a period of five years is sought to be curtailed by prescribing aforesaid period of three months by way of Notification, and the said Order by way of Notification is unconstitutional, invalid, is not issued in accordance with law or after due procedure prescribed by law.

6.1 Mr.N.D.Nanavati, learned Senior Advocate appearing with Mr.J.S.Yadav leading arguments on behalf of the petitioners submitted that clause 5 of the Order, 1981 states that licence shall be issued for a period of five years and will remain in force from 1st January of every year till the end of period of five years i.e. for five calendar years and the said clause does not envisage any shorter period of validity of licence. It was further contended that even the renewal of licence as stipulated in clause 5 was for a period of five years and

there was no provision which would permit limiting the said period. Thus, the Order by way of Notification restricting the renewal for a period of three months is ex-facie illegal and contrary to the provisions of the Order, 1981. The attention of the Court was invited to clause 2 of the Order, 1981 which lays down various definitions. It was submitted that clause 2(13) of the Order,1981 states that "licensing authority" means the authority as specified in sub-clause (a), (b) or (c). That the power of the licencing authority are as stated in various clauses of the Order,1981 and and generally deal with granting or refusal of licence, renewal of licence, suspension of licence or cancellation of licence. However, there is no power with the licencing authority to limit the period of licence. It was further contended that the Order by way of Notification was in the nature of an exercise by which the judgment delivered by the Division Bench of this High Court was sought to be done away with or bye-passed in the guise of exercising powers under clause 28 of the Order, 1981. That the Notification is violative of Article 14 and Article 19(1)(g) of the Constitution of India in as much as it creates a class of wholesale dealers company agents who do not have any intelligible differentia vis-a-vis the petitioners; that there was no rational nexus which would go to establish the object of restricting the period of licence. That there was no public interest involved and hence the restriction of the period could not be termed to be a reasonable restriction of the fundamental right to carry on an occupation or a business. It was also contended that the Order by way of Notification has been issued in hot haste without application of mind and for this purpose various submissions were made pointing out the difficulties which would be experienced by the consumers, being main persons who would be directly affected by virtue of abolition of wholesale dealers. It was also contended that the Order by way of Notification was dehors the provisions of the Order,1981, provisions of Essential Commodities Act,1955 and powers granted to the State Government by the Central Government under Section 5 of the Parent Act viz. The Essential Commodities Act,1955. It was urged that for all the aforesaid reasons the Order by way of Notification was required to be struck down and the State Government be directed to grant licence/renew for a period of five years without restricting the same to the period of three months with further extension of three months from time to time.

6.2 Mr.A.D.Oza, learned Government Pleader defended the impugned Order by way of Notification stating that

the impugned order itself states that it was issued in view of the judgment delivered by the Division Bench of this Court in various Letters Patent Appeals filed by group of wholesale kerosene dealers and it was issued by exercising power conferred by clause 28 of the Order, 1981. Referring to the affidavit-in-reply it was pointed out that the petitioners were not correct in reading provision of clause 5 of Order, 1981 that there was compulsion on the Government to issue or renew the licence for the stipulated period only; that it was open to the Government to either reduce the period or enhance the period depending upon the requirement of the society at large and other relevant factors. It was contended that the object of the Parent Act, Order, 1981 and the impugned order was to ensure that there was smooth and equitable distribution of kerosene under the public distribution system meant for the persons below the poverty line, and hence in light of the same, if the Government thought it fit to restrict the period of licence, to ensure checks on mal practice , it was not open to the Court to direct the Government to extend the said period. It was further submitted that issuance or renewal of licence cannot be for the period which is claimed by the petitioners and the Government was at liberty to reduce the said period if it was necessary in the public interest. That the impugned Order by way of Notification merely regulated process and issuance/renewal of licence and did not contravene any powers delegated to the State Government by the Central Government under Section 5 of the Essential Commodities Act,1955. That clause 5 of the Order,1981, prescribes period of five years for issuance/renewal of licence, but that did not mean that the licence had to be issued for the entire period of five years, but the provision should be read to mean that the period of five years was the outer limit or the maximum period. Referring to and relying upon clause 28 of the Order, 1981 it was submitted that the said clause opened with non obstante clause and hence conferred power on the State Government to issue a notification without taking into consideration any of the foregoing provision as stipulated in the said clause. It was further submitted that on a plain reading of clause 28 of Order, 1981 it was apparent that any provision of Order, 1981 could be suspended or amended for the period which the Government may deem fit and hence the impugned Order by way of Notification was perfectly justified in accordance with the provisions of Order, 1981. After referring to paragraph 29 of the decision of the Division Bench of this Court, attention of the Court was invited to the following averment made in the affidavit-in-reply.

"In view of the above judgment licences of all the petitioners are renewed and quotas of kerosene allocated to them are regularly being given therefore it is not true to say that wholesale dealers are deprived of their fundamental right to carry on business guaranteed under Article 19(1)(g) of the Constitution of India."

Lastly, it was contended that the Government had not yet taken any policy decision as regards wholesale dealers of kerosene under the public distribution system and till the point of time the Government took a policy decision, it was decided to restrict the period of licence and extend the same at the end of every three months so as to enable the Government to implement the policy which was likely to be framed.

7. It appears that the State Government issued various circulars being circulars dated 30/7/1988, 4/10/1990, 3.4.1995, 6.1.1997, 29.8.1997, 22.1.1999, 6.2.2001 and 19.6.2001, by virtue of which the wholesale dealers in Kerosene were aggrieved on the ground that the policy laid down in the said circulars completely abolished a class of wholesale dealers appointed directly by the licensing authority, that on expiry of existing licenses, the license of such wholesale dealers were not being renewed and licenses were granted or renewed only in favour of wholesale dealers who were appointed as Agents of Oil Manufacturing Companies. The said circular came to be challenged in a group of Special Civil Applications and which were rejected by the learned Single Judge of this Court (Coram :Mr.Justice M.R.Calla). The wholesale dealers who were so affected preferred Letters Patent Appeals and the same came to be decided on 1/8/2001 by Division Bench of this Court (Coram :Chief Justice Mr.D.M.Dharmadhikari [as he then was] and Mr.Justice K.R.Vyas). The decision was rendered in Letters Patent Appeal No. 538 of 2001 with cognate matters. The Division Bench of this Court after taking into consideration the provisions of the Essential Commodities Act,1955, Provisions of Order, 1981 and all aforesaid circulars analysed the Scheme of the 1955 Act and the Order, 1981 and came to the conclusion that :

"26.Our conclusion, therefore, is that the impugned circular are merely executive

instructions dehors the Licensing Order. It is not a law and not even a delegated or subordinate legislation which can be said to be covered under Article 19(6) of the Constitution of India."

Thereafter, the Division Bench dealt with the contentions raised on behalf of the State Government that no fundamental right under Article 19(1)(g) of the Constitution had been infringed in para 29 of its judgment by stating thus :

"29. The petitioners can claim a fundamental right to carry on trade in kerosene in accordance with law as wholesalers or retailers. A restriction imposed on them to carry on trade as wholesalers only after obtaining agency from the oil company is a restriction on their right and even though such a restriction may be said to be reasonable, it can be imposed only by law and not by merely Circulars or executive instruction which, as we have held above, are not in accordance with either the Licensing Order or the Act. The impugned Circulars containing executive instructions and directions by the State of various authorities including the Licensing Authority, therefore are not protected by Article 19(6) of the Constitution of India, and therefore, they have to be struck down as contravening petitioners' right under Article 19(1)(g)."

8. It is in this backdrop of circumstances that the impugned Order by way of Notification has been issued as can be seen from the preamble. The impugned order specifically states that it is made in exercise of the powers conferred by clause 28 of the Order, 1981. In paragraph 1, it is stated that the impugned order may be called Gujarat Essential Articles (Licensing, Control and Stock Declaration) Amendment Order,2001. Paragraph 2 states that it shall come into force at once and apply to those PDS Kerosene Wholesale Dealers who are not Company Agents. Paragraph 3 states that the existing licenses which expire on 31/12/2001 shall be renewed for a further period of three months i.e. upto 31/3/2002. The subsequent order dated 30/3/2002 is on similar lines except for the fact that it is to be called as Amendment Order 2002 and the period of renewal is further extended upto 30/6/2002. During the course of hearing, Mr.A.D.Oza, learned Government Pleader made a statement

to the effect that no further Order by way of Notification has been issued or is likely to be issued but the period of licenses shall stand extended at least till the decision of this Court in this group of petitions.

9. Clause 5 of the Order, 1981 as is relevant for the purpose of present controversy, is reproduced hereunder :

"5. Period of licence and fees chargeable. -

(1) Every licence granted under this Order shall be valid for a period of five years from the 1st January of the year in which it is issued and may be renewed for a period of five years if an application for the renewal thereof is made within a period of its validity :

Provided that a licence issued after the 15th October of an year shall be valid upto the end of five years beginning from the next succeeding year ...."

(emphasis supplied)

9.1 Clause 5 provides for the period of licence and fees chargeable. Sub-clause (1) states that every licence granted under Order, 1981 shall be valid for a period of five years from the 1st January of the year in which it is issued and may be renewed for a period of five years if an application for renewal is made within the period of its validity. The first Proviso under sub-clause (1) states that in the event of a licence having been granted after 15th October of a year such licence shall be valid for a period of five years beginning from the next succeeding year i.e. for a period of five years and more depending upon the point of time when the licence is granted after 15th October of a year. The second Proviso under sub-clause (1) permits application for renewal even after expiry of the period of licence but restricts it to end of February immediately following the date of expiry and it would be open to the licensing authority to renew if sufficient reasons are made out. Sub-clause (2) of clause 5 provides for a situation where an application for renewal is made within a period of validity but the licencing authority does not either renew or refuse to grant renewal before expiry of such validity, then the licence shall be deemed to continue till date of such decision. Sub-clause (4) provides for charging prescribed fees and depending upon the category of persons seeking licence

various fees have been prescribed as stated in sub-clause (4). Thus, on a plain reading of provisions of clause 5 it is apparent that the period of a valid licence is five years from the initial grant as well as for the renewal. It is not possible to accept the contention of the respondents that the period of five years has to be read as the maximum period prescribed in light of the language employed in clause 5(1) of the Order 1981. In fact, there is inherent indication by virtue of the first proviso under sub-clause (1) of clause 5, which permits that the licence may be valid for a period of more than five years where it is issued after 15th October of a year. Similarly sub-clause (4) which prescribes fees chargeable in respect of each licence does not envisage charging of fees for a lesser period. The fees are charged for the issue of licence, renewal of licence or issue of duplicate licence. It is nowhere stated that if the licence is to be granted or renewed for a lesser period, proportionately lesser amount of fees shall be charged. The requirement of issuance of duplicate licence would normally arise during the period of validity of licence already granted and contingencies in which the duplicate licence can be issued have been stipulated in sub-clause (3) whereunder it is stated that duplicate licence may be obtained if the licence issued is either lost, destroyed or defaced. If the fees prescribed for issuance and renewal of licence are taken into consideration it is apparent that they pertain to the entire period of five years laid down in sub-clause (1) of Order 1981. Hence, in any view of the matter it is not possible to accept the submission of the respondent that licence can be granted or renewed for a lesser period than the period prescribed in sub-clause (1) of clause 5 of the Order 1981.

9.2. Clause 28 of the Order,1981 reads as under :

> "28. Power of the State Government to suspend all or any of the provisions.- Notwithstanding anything contained in the foregoing provisions of this Order, the State Government may, from time to time, by notification in the Official Gazette suspend for such period as may be specified in such notification, application of all or any of the provisions of this Order in the whole State or any part thereof, and may at any time amend or rescind such suspension."
>
> (emphasis supplied)

9.3. The aforesaid clause stipulates that the State

Government is empowered to issue notification in the Official Gazette regardless of what is contained in any of the foregoing provisions of Order, 1981, to suspend for a period which is to be specified in the notification the application of all or any of the provision of the Order, 1981 in the whole State or any part of the State, and further the State Government is empowered to amend or rescind such suspension. Thus, on a plain reading of this clause the only power that the State Government is granted under the clause is to suspend all or any of the provisions of the Order, 1981 and amend or rescind such suspension. The suspension may be for the whole State or only for a part of the State. The provisions of clause 28 nowhere envisage the amendment of any of the provisions of the Order, 1981 and therefore the contention of the respondents that the impugned Order by way of Notification merely amends provisions of clause 5 cannot be accepted. The only power available is to suspend all or any provision of the Order, 1981; the power to amend is available in relation to such suspension. If the Government exercises power to suspend a particular provision of Order, 1981, it can amend such suspension or it can rescind such suspension. At the cost of repetition it has to be stated that there is no power of amendment of any provision of the Order.

10 However, assuming for the sake of argument that as contended by the respondent, the power of amendment is available under clause 28 of the Order, 1981, the said argument may be tested by reference to clause 5 of the Order, 1981. The impugned Order by way of Notification merely states that existing licences shall be renewed for further period of three months. The former portion of sub-clause (1) of clause 5 of Order, 1981 deals with granting of licence while the later half of the said sub-clause deals with renewal. By virtue of the impugned Order by way of Notification, the entire clause 5 would have to read that every licence granted under the Order, 1981 shall be valid for a period of five years from 1st January of the year in which it is issued or shall be valid for a period of less than five years from 1st January of the year in which it is issued, provided there is any unexpired period from the said period of five years. Similarly later portion of sub-clause (1) which states that every licence may be renewed for a period of five years would have to read that every licence granted may be renewed for a period of five years or less than five years instead of the period of five years from the date of expiry and validity of the original period of five years. It is just not possible to envisage that the provision can be read in a manner leading to such

uncertainties whereby the provision does not have any consonance with the Proviso under the said sub-clause and other sub-clauses of clause 5 of Order, 1981. Further more, it is well established canon of interpretation that where the language of a provision is clear and unambiguous it is not open to the Court to read anything in the said provision by way of adding words or modifying the language so as to read any intended meaning. In the present case even that situation is absent.Even on a plain reading it cannot be stated that the provision does not convey what is intended.

11 As already seen hereinbefore the entire exercise has been undertaken by the State Government only with a view to curtail the period of licences already issued/renewed till it arrives at a policy decision as stated in its affidavit in reply. The petitioners having already applied for renewal after paying the entire prescribed fees which are chargeable in respect of each licence for a period of five years it is not open to the licencing authority to restrict the period of renewal by reference to the impugned Order by way of Notification .

12 Clause 28 of the Order, 1981 permits suspension of a provision. In case clause 5 is treated to have been suspended by exercise of powers under clause 28 by issuance of Order by way of Notification, there is no other provision which prescribes requirements for grant/renewal of licence. Hence, the action would fail on this count also. As already stated, amendment is not permissible. Similarly clause 28 does not permit partial suspension of a provision. The words used in the said clause are : " .... suspend for such period as may be specified in such notification, application of all or any of the provisions..." and not any part of the provisions. Thus, the entire exercise of issuing Order by way of Notification does not have any support in law. There is one more aspect. CLause 28 permits suspension of all or any provision of the Order,1981. It does not permit issuance of a positive order. There is no such power. Hence, the impugned Orders by way of Notification are beyond competence and without authority in law.

13 In the affidavit-in-reply it is stated that the decision of the Division Bench of this Court has not established or stated that the Government cannot make policy in this regard. Moreover, it has also been not said anywhere in the said judgment that the petitioners should be given licence for five years. The contention that the Court has not prohibited the Government from framing any policy is correct, but to say the least, the

use of the language and the tenor could have been avoided especially when the affidavit has been sworn by an officer of the rank of Under Secretary to the Government of Gujarat. A Court is required to adjudicate - not establish In so far as the later part of the submission is concerned that the judgment has not directed that the petitioner should be given licence for five years, suffice it to state that the Court was not called upon to decide any such controversy and hence it was not necessary for the Court to give any such direction. From that it does not follow that provisions of clause 5 of Order,1981 have not to be read and interpreted when the Court is specifically called upon to decide the controversy relating to the said provision.

14 To summarise :

[a] Clause 5 of Order, 1981 does not envisage a situation where licence can be granted for a period of less than five years and it is not possible to read the plain language of the said clause in any other manner.

[b] Clause 28 of Order, 1981 provides for a limited power of suspension and there is no power of amendment granted by the said clause on a plain reading of the provision.

15 In light of what is stated hereinbefore the impugned Orders by way of Notification are held to be illegal and contrary to the provisions of Order, 1981 and are required to be quashed and set aside. Taking into consideration the aforesaid finding and conclusion the issue as to whether the impugned Orders by way of Notifications are violative of Article 14 or 19(1)(g) of the Constitution of India is left open.

16 The impugned Orders by way of Notifications dated 31/12/2001 and 30/3/2002 are hereby quashed and set aside being illegal and contrary to the statutory provisions of clause 5 of Order, 1981. The licensing authority, therefore, shall act strictly in accordance with the provisions of clause 5 of the Order, 1981 without being fettered in any manner whatsoever by way of impugned Orders by way of Notification and decide the applications for grant or renewal of licence in accordance with law.

17 In some of the petitions it was contended that the applications for renewal have not been made within the prescribed period of limitation. Suffice it to state that the licensing authority shall deal with the

applications for renewal in accordance with law taking into consideration the point of time for renewal applications and the powers available to the licensing authority to deal with such renewal applications as if the impugned Orders by way of Notification had never been issued.

18 The petitions are allowed accordingly. Rule made absolute. There shall be no order as to costs.

Sd/-
(D.A.Mehta, J)
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